

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

Original

77-4196

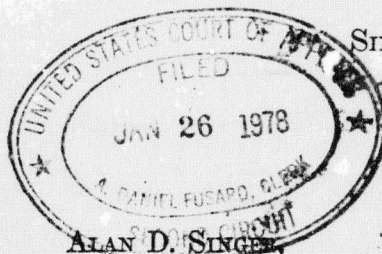
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
ELMSFORD SHEET METAL WORKS, INC.,
Intervenor,
v.
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38,
Respondent.

On Application for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR INTERVENOR
ELMSFORD SHEET METAL WORKS, INC.



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TABLE OF CONTENTS

	PAGE
STATEMENT OF ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
THE BOARD'S FINDINGS OF FACT	2
BACKGROUND	3
ARGUMENT—The Board properly found that the Union violated Section 8(b)(3) of the Act by in- sisting to impasse on the inclusion of non-manda- tory proposals about interest arbitration and in- dustry promotion funds in the new contract	4
CONCLUSION	6

Statute Cited

National Labor Relations Act:

Sec. 8(b)(1)(B)	2
Sec. 8(b)(3)	1, 2, 4
Sec. 10(e), as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151)	2

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Statement of Issues Presented

1. Whether the Board properly found that the Local violated Section 8(b)(3) of the Act by insisting to impasse on the inclusion in the parties' contract of non-mandatory proposals about interest arbitration and industry promotion funds.

2. Whether the Board properly found that the Local restrained and coerced the Company in the selection of its bargaining representative, thereby violating Section 8(b)(1)(B) of the Act.

Statement of the Case

This case is before the Court upon the application of the National Labor Relations Board for enforcement of its order issued against Sheet Metal Workers International Association, Local Union No. 38 (hereafter, the "Union") on August 29, 1977, by members Jenkins, Penello and Walther (Chairman Fanning and Member Murphy dissenting), and reported at 231 NLRB No. 101 (A. 73-94).^{*} This court has jurisdiction over the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 *et seq.*), because the unfair labor practices occurred in or around Peekskill, New York, where Elmsford Sheet Metal Works, Inc. (hereafter, the "Company"), a sheet metal contractor and Intervenor/Charging Party herein, has its principal place of business.

The Board's Findings of Fact

The Board found that the Union violated Section 8(b)(3) of the Act by insisting to impose that the Company agree to inclusion of two non-mandatory subjects of bargaining in their new contract. The Board further found that the Union violated Section 8(b)(1)(B) by restraining the Company in its choice of bargaining representative.

^{*} "A" references are to the appendix.

This case was before the Board on a stipulated record, the parties having agreed to waive a hearing before, and decision by, an Administrative Law Judge. The parties also stipulated that no issues were presented which would require oral testimony (A. 73; 1).

Background

Rather than burden this court with recitations of factual matters not in dispute and already adequately covered in the brief of the National Labor Relations Board, we will point out herein only one relevant fact which the Board has apparently overlooked. On page 4 of its brief, the Board indicates that the company sent a letter to the Union on March 25, 1976 indicating its desire to negotiate a new contract without the industry promotion fund and interest arbitration provisions. It should, however, be noted that the initial proposal by the Union for renegotiating the contract contained, among other things, an item calling for the elimination of the industry promotion funds (A51). In subsequent minutes of negotiation sessions, prepared by the Union, dated May 11 and August 30, 1976, respectively, it is stated that Elmsford Sheet Metal Works had agreed to the elimination of the industry promotional fund provisions (A56, 61).

Having agreed to the Union's proposal to eliminate the industry promotional funds, the Union then reversed its position and proceeded to insist upon the continuation of those fund provisions. Indeed, the final agreement executed by the Union and the Association not only retained the provisions relating to industry funds, but increased the contribution of the employers from \$.015 to \$.02 per hour.

ARGUMENT

The Board properly found that the Union violated Section 8(b)(3) of the Act by insisting to impasse on the inclusion of non-mandatory proposals about interest arbitration and industry promotion funds in the new contract.

Initially it should be noted that the intervenor is in complete agreement with the arguments presented by the Board in its brief and hereby adopts said arguments as its own for purposes of this brief. In addition, the intervenor wishes to point out to this court one aspect of this case which seems not to have been stressed by the Board in its brief.

It is, perhaps, legally sufficient to point out that the industry promotion fund clauses in the contract relate to non-mandatory subjects of bargaining as to which the Union may not proceed to impasse in insisting upon their inclusion in the contract. As a general principle of law, that is easy enough to understand and accept. The real evil of the provision and the Union insistence upon its retention however, is both somewhat more complicated and subtle.

In point of fact, the industry promotional funds are used primarily to fund the operations of the local and national Sheetmetal Contractors Associations (thus, the claim of the Union in its brief before the Board, that the funds are necessary to the promotion of the industry as a whole and thus, arguably related to mandatory subjects of bargaining, is factually inaccurate as well as being legally unsupported). The result is that the Union finds itself able, through the proper manipulation of the contract, to indirectly control the purse strings of the very association which is called upon to negotiate the contract and par-

ticipate in binding arbitration of items which cannot be agreed upon at the bargaining table. No wonder the Union is so insistent upon the retention of both the industry promotional funds and binding interest arbitration provisions of the contract!

It is not insignificant that one of the Union's first demands in negotiating the new contract was for elimination of the industry promotional funds. Obviously, this demand was a not-so-subtle method of informing the association that unless agreement were reached on the disputed items of wages, benefits and other conditions of employment, the association may find itself without necessary funding to continue in existence. At least in the opinion of the intervenor, as evidenced by its letter of resignation from the association (A47, 48), such power of the Union over the purse strings of the association has resulted in the inability of the association to adequately represent its membership in negotiations. There is something inherently improper about allowing a Union to control the actions of the bargaining representatives of the employer through the skillful manipulation of the funding for that bargaining representative. The association cannot really be a free and independent voice representing only the interests of its membership when the largest portion of its budget is dependent upon the good offices of the Union in continuing to require payment to industry promotional funds in its contract with the employers. The result is that an institution which was originally founded as a tool for the employer has now become the master of the employer, and indeed, a slave to the Union.

This reversal of loyalties is perpetuated by the interest arbitration provision of the contract which gives that same institution the power to continually require the payment of its expenses, even though it may no longer be representing the interest of the majority of its members.

That situation is bad enough, but for the Union to insist to impasse that a non-member, a dissenting voice, continue to support financially an institution with which it violently disagrees is neither legally permissible nor conducive to the encouragement of decent labor relations.

In sum, therefore, we have here a very basic conflict of interest developed, encouraged and manipulated by the Union's insistence upon the dual provisions relating to industry promotional funds and interest arbitration. This conflict of interest is destructive of the fundamental principles upon which the National Labor Relations Act is founded. It is not merely a question of whether the items under dispute are mandatory or non mandatory subjects of bargaining, and it goes beyond the question of whether it involves a restraint of the employer in the choosing of his bargaining representative. Through the clever continuation and manipulation of the repugnant clauses of the contract, the Union can, and in the opinion of the intervenor has, unlawfully influenced the employer's bargaining representative. No Union should be in a position directly or indirectly of controlling the very funding of the organization with whom it negotiates. Worse yet, no Union should be able to require an employer to perpetuate that inherently illegal and unethical situation over the employer's objection.

CONCLUSION

For the foregoing reasons, we respectfully request that the court enter a judgment enforcing the Board's order in full.

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National Labor Relations Board

Petitioner

and

Elmsford Sheet Metal Works Inc.,

Intervenor

v.

Sheet Metal Workers International
 Association Local Union No. 25

Respondent

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is
 agent for Singer & Silverstein Esq. the attorney

for the above named Intervenor herein. That he is over
 21 years of age, is not a party to the action and resides at 11 Park Place New York, New York

That on the 25th. day of January , 19 78, he served the within
 Brief

upon the attorneys for the parties and at the addresses as specified below

National Labor Relation Board
 Service of Papers
 Washington D.C.

Delson & Gordon Esq.
 230 Park Avenue
 New York, New York

by depositing true copies to each
 to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
 tained by the United States Government at
 90 Church Street, New York, New York
 directed to the said attorneys for the parties as listed above at the addresses aforementioned,
 that being the addresses within the state designated by them for that purpose, or the places
 where they then kept offices between which places there then was and now is a regular com-
 munication by mail.

Sworn to before me, this 25th.
 day of January , 1976


 Roland W. JOHNSON,
 Notary Public, State of New York
 No. 4509705

Qualified in Delaware County
 Commission Expires March 30, 1977

